National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

August 4, 2006 W-3063

VISIT WWW.NLRB.GOV FULL TEXT
CASES SUMMARIZED

Corrections Corp. of America	San Ysidiro, CA	1
Double J. Services, Inc.	Byron Center, MI	1
Iron Workers Local 340	Grand Rapids, MI	2
Randell Warehouse of Arizona, Inc.	Tucson, AZ	2
TNT Logistics North America, Inc.	East Liberty, OH	5
United Cerebral Palsy of New York City	Brooklyn, NY	6
Universal Syndications, Inc.	Canton, OH	7
Valley Honda	Monroeville, PA	7

OTHER CONTENTS

Corrections Corp. of America (21-CA-36223, 36225; 347 NLRB No. 62) San Ysidiro, CA July 28, 2006. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by initiating a drive to decertify Security, Police, and Fire Professionals and then coercing its employees to support the decertification drive by informing them that it would know who did and who did not support that effort, and transferring Correction Officer Edward Carroll from his position as a court security officer to a less desirable position because of his union activities. It also agreed with the judge that the Respondent violated Section 8(a)(3) and (1) by unlawfully discharging Correction Officer Mireles because of his union activities, including his attempt to represent another employee during a misconduct investigation. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Security, Police, and Fire Professionals and Edward Carroll, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at San Diego, Oct. 4-7, 2004. Adm. Law Judge James M. Kennedy issued his decision Feb. 3, 2005.

***

Double J. Services, Inc. (7-RC-22798; 347 NLRB No. 58) Byron Center, MI July 28, 2006. Contrary to the hearing officer, Chairman Battista, with Member Liebman concurring and Member Schaumber dissenting, found that the Employer's changes in work policies on Oct. 20, 2004, Supervisor James Jones' creation of an impression of surveillance, and Jones' interrogation of employee Patrick Terris constituted objectionable conduct. Therefore, the majority set aside the election held Dec. 2, 2004, which resulted in 6 votes for and 9 against, Teamsters Local 337; and directed a second election. [HTML] [PDF]

Dissenting Member Schaumber explained that in his view, none of the Petitioner's objections warrant a new election. He addressed the work rule changes, asserting that the hearing officer correctly found that they were de minimis and that: "the objecting party failed to carry its 'heavy burden' of establishing a nexus between the rule changes at issue and the election such that employees would reasonably perceive the changes either as an attempt to influence their votes in the election or, as alleged by my colleagues, an attempt to retaliate against employees for filing the petition." In addressing the issues of alleged interrogation, alleged impression of surveillance, and alleged threats of job loss, he found that they are without merit, and would therefore overrule the Petitioner's objections and issue a certification of results.

Concurring, Member Liebman said she fully agreed, for the reasons stated in the majority opinion, that the critical-period work rule changes warranted a second election and that she wrote separately only to further address the dissent. She concluded that work changes, whether by design or consequences, would foreseeably inhibit union-related conversations between the lumpers (employees who palletize loads coming off trucks), during the ongoing organizing campaign, by minimizing opportunities for them to congregate in the waiting room. Member Liebman wrote: "Even if a union organizer sought to seize on these restrictions as a campaign issue, they would still serve to hinder the union's efforts."

The hearing officer recommended setting aside the election based on the Employer's statement to employees at an early November 2004 meeting about Gordon Food Services' very likely reaction to a vote in favor of the Petitioner. In view of their decision to set aside the election, the majority found it unnecessary to address the Petitioner's remaining objections.

(Chairman Battista and Members Liebman and Schaumber participated.)

****

Iron Workers Local 340 (7-CB-14096; 347 NLRB No. 57) Grand Rapids, MI July 25, 2006. The Board adopted the administrative law judge's findings and held that the Respondent Union violated Section 8(b)(2) of the Act by attempting to cause Consumers Energy Co. to prevent its subcontractors from employing Charging Party Thomas Taylor, and by attempting to cause employers to discriminate against Taylor by requesting that employers provide the Respondent with letters precluding Taylor's employment. It also found that the Respondent violated Section 8(b)(1)(A) by threatening Taylor with retaliation for filing charges with the Board in agreement with the judge. [HTML] [PDF]

The Board reversed the judge's finding that the Respondent violated Section 8(b)(1)(A) by failing to refer Taylor, a long-time and vocal union dissendent, to a job with contractor Steelcon. In determining whether the Respondent's failure to refer Taylor as a hook-on employee was unlawful, the Board applied the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), and found that the Respondent met its rebuttal burden of establishing that it would not have referred Taylor to work with Mansfield as a hook-on employee even in the absence of his protected activity.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Thomas E. Taylor, an Individual; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Grand Rapids, Dec. 9-10, 2004 and Feb. 15-16, 2005. Adm. Law Judge John T. Clark issued his decision Aug. 19, 2005.

****

Randell Warehouse of Arizona, Inc. (28-CA-16040; 347 NLRB No. 56) Tucson, AZ July 26, 2006. Chairman Battista and Members Schaumber and Kirsanow, with Members Liebman and Walsh dissenting, found that Sheet Metal Workers Local 359 (Union) engaged in objectionable conduct when its agents photographed employees during the Union's distribution of campaign literature. [HTML] [PDF]

The majority found that employees have a right to accept or not accept the Union's literature, and that photographing them as they make that choice would reasonably be coercive. The Union did not provide the employees with any legitimate justification for the photographing.

Thus, the majority found that the Union's conduct tended to interfere with employee free choice in the election, and directed that a second election be held.

In a prior decision (*Randell I*), the Board found that the photographing was not objectionable because it was not accompanied by other coercive conduct. In that decision, the Board overruled precedent which had held that union photographing was objectionable even if it was not accompanied by other coercive conduct. The Board there retained the rule that employer photographing was presumptively coercive, even if it was not accompanied by other coercion.

The D.C. Circuit Court of Appeals did not agree with the Board. The court noted that the Board had not dealt adequately with its prior decision in *Mike Yurosek*, 292 NLRB 1074 (1989). The court remanded for "further consideration and a reasoned opinion." The court did not preclude the Board from overturning precedent so as to clarify Board law.

Upon reconsideration, the majority in *Randell II* concluded that the *Randell I* rationale for the different standards for employees and unions could not withstand careful scrutiny. The majority stated:

> The rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the party engaged in such conduct is a union or an employer. Thus, the disparate treatment embraced by the *Randell I* Board cannot be squared with the Act's fundamental principles.

The decision stated:

> In the context of an election campaign, the union seeks to become (or remain) the representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.
>
> Accordingly, the majority overruled *Randell I* and found that:
>
> [I]n the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.
>
> Applying that principle, the majority concluded that:

> [T]he Union engaged in objectionable conduct by photographing employees as they were being offered literature by Union representatives. For the reasons explained above, such photographing is presumptively coercive. Moreover, the Union did not adequately explain its purpose for the photographing. The one explanation offered to a single employee — "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run" — was ambiguous at best. It did not establish a legitimate justification for the photographing. Accordingly, the photographing reasonably tended to interfere with employee free choice, and the election must be set aside.

In dissent, Members Liebman and Walsh disagreed with the majority's overruling of *Randell I* and stated they would adhere to the Board's original decision. They noted, first, that the D.C. Circuit remanded the case to the Board for the limited purpose of considering whether certain allegedly coercive conduct by pro-union employees made the union's photographing objectionable, and thus it was unnecessary for the majority to reach out and overrule the Board's original decision. The dissent contended further that the majority failed to grasp the "very different positions that unions and employers occupy with respect to employees, in terms of campaign access, economic relationship, and potential for coercion," as well as the legitimate interests that unions have in photographing employees in order to gauge and record their interests in organizing.

The dissent found that employers are in a far more effective position to coerce employees than unions are, stating:

> To point out the obvious, employees are economically dependent on the employer, who controls every aspect of their working lives. The employer may fire workers, discipline them, impose harsher working conditions, cut their pay, and deny them benefits.

The dissent also contended employees likely will recognize the union's legitimate interest in photographing, in the absence of any coercive union conduct that would raise suspicion, even if the union does not provide employees with an explanation.

The dissent defended the *Randell I* rationale for applying a different standard to union and employer photographing, stating:

> Recognizing that the realities of the workplace bear differently on employers and on unions is not disparate treatment; it is common sense and fidelity to the Act. Our original decision in this case was correct. Today's decision, in contrast, is arbitrary both in failing to see the difference between union photographing and employer photographing and in failing to see the similarity between union photographing and other, permissible organizing tools. The result places unions in a dilemma: Photographing employees is objectionable, unless a legitimate

justification is communicated to the employees, but the majority implies that a central justification for photographing employees, to identify supporters and potential supporters of the union, is inherently coercive. In light of its internal contradictions, we do not see how the majority's decision can stand.

(Full Board participated.)

****

TNT Logistics North America, Inc. (8-CA-33664-1, 33810-1; 347 NLRB No. 55) East Liberty, OH July 24, 2006. No exceptions having been filed, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge an employee because of his union sympathies, asking union supporters to resign their employment if they were dissatisfied with working conditions, coercively interrogating employees concerning employees' protected concerted activities, giving the impression to employees that it was surveilling their protected concerted activity, and coercively interrogating an employee concerning his union sympathy and support. [HTML] [PDF]

The judge further found that the discharges of Emerson Young, John Joliff, and Steven Daniels violated Section 8(a)(1). At issue is whether a letter sent by these employees to the Respondent's corporate management and to Honda of America, the Respondent's primary customer at its East Liberty facility, constituted unprotected activity because it was maliciously false, warranting the employees' discharge for cause. The letter listed items that the employees believed constituted mistreatment and discrimination by two named managers, accusing one of the managers of rarely being present to hear employee complaints and of lying to employees, and accusing the other of being interested in his own needs and his own friends and of once pushing an employee. It also listed and described four particular areas of concern at the facility: health, funerals, insurance, and logbooks.

The judge concluded that the discharges violated the Act because the employees' involvement in preparing and sending the letter was protected concerted activity. Quoting *Allied Aviation Services*, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980), the judge said that "absent a malicious motive [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum."

Chairman Battista and Member Schaumber agreed with the Respondent's contention that the statements accusing the Respondent of asking employees to "fix" logbooks, which could result in civil if not criminal penalties, rendered the letter unprotected. They reversed the judge and found that the employees were discharged for cause, noting their letter was unprotected because it was maliciously false. Member Schaumber also found that the employees' letter was unprotected because it publicly disparaged the Respondent.

Contrary to his colleagues, Member Walsh would adopt the judge's finding that the discharges of Young, Joliff, and Daniels violated Section 8(a)(1). He wrote: "While the log book statements in the letter may have been in fact false, in the sense that there is no evidence that employees were actually *asked* by management to falsify their logs, it did not lose the protection of the Act. . . if it was not maliciously false, i.e., knowingly false or made with reckless disregard for whether or not it was false." Member Walsh further wrote: "It was, in short, not maliciously false, and its inclusion in the letter therefore did not deprive Young, Joliff, and Steven Daniels of the protection of the Act."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Emerson Young and John Jolliff, Individuals; complaint alleged violation of Section 8(a)(1). Hearing at Marysville on May 20, 2003. Adm. Law Judge William G. Kocol issued his decision July 16, 2003.

****

United Cerebral Palsy of New York City (29-CA-26927; 347 NLRB No. 60) Brooklyn, NY July 27, 2006. The Board reversed the administrative law judge's finding that this case is suitable for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and affirmed the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by distributing to employees a handbook that changed their terms and conditions of employment without notifying or bargaining with Teachers (AFT) Local 2; and by direct dealing with employees by requiring them to sign a statement agreeing to comply with the handbook and acknowledging that they understand that the Respondent may make future changes without providing advance notice. [HTML] [PDF]

In finding that this case was appropriate for deferral, the judge rejected the General Counsel's contention that the Respondent's unilateral changes, as set forth in an employee handbook, amounted to a rejection of the collective-bargaining agreements. Although the judge acknowledged that the handbook's change of the grievance procedure was "troubling," he found that it nonetheless did not amount to a rejection of the collective-bargaining agreements. The Board noted that the judge's analysis of the deferral issue did not address the General Counsel's direct-dealing allegations.

The Board reasoned that this case involves more than mere changes to some terms of the collective-bargaining agreements; it involves allegations of conduct amounting to a de factor rejection of the bargaining relationship between the Respondent and the Union. Contrary to the judge, the Board determined that deferral is not warranted and that, on the merits, the Respondent violated Section 8(a)(5) and (1) as alleged.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teachers (AFT) Local 2; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on Aug. 17, 2005. Adm. Law Judge Howard Edelman issued his decision Dec. 7, 2005.

***

Universal Syndications, Inc. (8-CA-35901; 347 NLRB No. 61) Canton, OH July 28, 2006. The Board adopted the recommendations of the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by threatening adverse action if Maggie Engelhart discussed certain conditions of employment with other employees, subjected Maggie Engelhart to surveillance because she engaged in protected concerted activity, and subsequently terminated Engelhard for engaging in such activity. [HTML] [PDF]

Engelhard and other employees would order pizza for lunch and give their money to a security guard who volunteered to receive and pay for the pizza orders. This case involves Engelhart's treatment after she complained to management that the security guard was allegedly stealing the employees' tip money instead of giving it to the pizza delivery person. Englehart claimed that, as a result of her complaints, management uttered coercive statements compelling her to stop complaining, placed her under surveillance, and denied her request for a leave of absence in June 2005. The judge concluded "Engelhard's discussion of the pizza tip incident did not amount to protected activity, a necessary component in establishing a Section 8(a)(1) prima facie case."

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Maggie Engelhart, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Cleveland, Dec. 8-9, 2005. Adm. Law Judge Michael A. Rosas issued his decision April 10, 2006.

***

Graham Automotive, Inc. d/b/a Valley Honda (6-CA-34581; 347 NLRB No. 59) Monroeville, PA July 28, 2006. The Board adopted the recommendations of the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the collective-bargaining agreement it reached with Machinists District Lodge 98. [HTML] [PDF]

The Respondent argued that its action was not unlawful because complete agreement was never reached on four provisions: (1) Union Security; (2) Sickness and Accident Benefits; (3) Working on Personal Cars; and (4) Alcoholism and Drug Abuse Program. The judge rejected the Respondent's argument, contending that the parties reached a complete agreement on terms and conditions of employment. The Board agreed and found that the evidence established that the parties reached a "meeting of the minds" on the four provisions and, accordingly, there was a complete agreement.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Machinists District Lodge 98; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Pittsburgh on Nov. 1, 2005. Adm. Law Judge Martin J. Linsky issued his decision Feb. 8, 2006.

***

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Electrical Workers IBEW Local 2326 (Vermont Telephone Co.) Springfield, VT July 24, 2006. 1-CB-10497; JD-52-06, Judge Martin J. Linsky.

United States Postal Service (Postal Workers Local 6726) Williamsburg, VA July 27, 2006. 5-CA-32295, et al; JD-51-06, Judge Michael A. Rosas.

Alcoa, Inc. (Steelworkers Local 115A) Lafayette, IN July 28, 2006. 25-CA-29487, et al.; JD-55-06, Judge Arthur J. Amchan.

The Earthgrains Co., a wholly owned subsidiary of Sara Lee Bakery Group, Inc. (Teamsters Local 215) Owensboro, KY July 28, 2006. 25-CA-29803; JD-44-06, Judge Paul Buxbaum.

Rosdev Hospitality, Secaucus, LP and La Plaza, Secaucus, LLC (UNITE HERE Local 69) Secaucus, NJ July 28, 2006. 22-CA-26794, 26922; JD(NY)-33-06, Judge Mindy E. Landow.

St. George Warehouse, Inc. (Teamsters Local 641) Kearny, NJ July 28, 2006. 22-CA-24902; JD(NY)-34-06, Judge Eleanor MacDonald.

Schwickert's of Rochester, Inc. (Roofers, Waterproofers and Allied Workers Local 96) Rochester, MN July 28, 2006. 18-CA-16899, et al.; JD-53-06, Judge Jane Vandeventer.

***

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

PCL Triad Joint Venture, Albuquerque, NM, 28-RC-6436, July 26, 2006 (Chairman Battista and Members Liebman and Kirsanow)

DECISION AND ORDER REMANDING [to Regional Director for further appropriate action]

Total Image Specialists, Inc., Columbus, OH, 9-UD-342, July 26, 2006 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION OF SECOND ELECTION

EPI Breads, Inc., Dallas, TX, 16-RC-10702, July 27, 2006 (Chairman Battista and Members Liebman and Kirsanow)

****

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

BWXT-Pantex, LLC, Amarillo, TX, 16-RC-10723, July 26, 2006 (Chairman Battista and Members Liebman and Schaumber)
Watkins & Shepard Trucking, Inc., Sayreville, NJ, 22-RC-12700, July 26, 2006 (Chairman Battista and
Members Liebman and Schaumber)
Guardsmark LLC, Dearborn, MI, 7-RC-22970, July 28, 2006 (Chairman Battista and Members Kirsanow and Walsh)

****

Miscellaneous Board Orders

ORDER [denying motion for reconsideration and to extend time for filing exceptions]

C & C Roofing Supply, Phoenix, AZ, 28-RC-6417, July 25, 2006

****